

mate-able with a corresponding plane of the other, said mated halves [pair] forming an upper plane and a lower plane as well as an essentially joined dorsal arc edge and respective ventral arc edges, essentially sandwiching therebetween at least one resiliently-flexible reed essentially spanning the ventrally oriented space essentially situated between the corresponding ventral arcs and the opposing pair of corresponding horseshoe arms, wherein said housing device comprises and defines an essentially quasi-horseshoe-shaped cavity sized to relatively snugly envelop the upper and lower plane and the dorsal arc edge of the caller frame, said ventral aspect of said housing comprising an essentially U-shaped ventral opening to said quasi-horseshoe-shaped cavity.

8. (Amended.) A housing device described in claim 7 wherein said [contour-mimicking upper surface] upper surface adapted to mimic the contour of the user's palate comprises an essentially convex surface.

II. REMARKS

During the telephone interview between the Examiner and Applicant and counsel, the parties discussed the claim rejection grounds based upon 35 U.S.C. § 112, ¶ 2. The claim amendments appearing herein, especially those to claim 1 and 3 which were expressly approved by the Examiner, should overcome all of said rejections. Concerning substitution of "housing device" for "device for housing" in claim 1, Applicant acknowledged that the Final Action "requested [Applicant] to provide a consistent use of the terminology" through the claims, but Applicant believed that amendment was not required by said "suggestion" coupled with the Final Action's statement that the Examiner would "treat dependent claims 2-20 as 'a device for housing'" for the purpose of the Final Action. Upon Applicant's agreement to amend claim 1 accordingly, the Examiner indicated in the telephone interview that the major obstacle to allowability had been overcome. Applicant notes that

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it was easier to change claim 1's "device for housing" to "housing device", rather than amending "housing device" out of claims 2 through 20, so Applicant elected the former since the two phrases are synonymous. A clean version of the entire set of pending claims is Attachment 1 hereto.

With respect to the claim rejection grounds under 35 U.S.C. § 102(b) based upon U.S. Patent No. 4,960,400 issued to Cooper (the "'400 Patent"), Applicant and counsel explained the features distinguishing Applicant's claims over the disclosure of the '400 Patent, essentially as reiterated in Applicant's previous response to the Final Action, which response was mailed 26 September 2002. Although the Examiner rendered no final opinion as to the allowability of all pending claims 1 through 20 (choosing to defer opining until reviewing the '400 Patent in view of the understanding achieved during the telephone interview), the Examiner tentatively stated that the claim amendments appearing herein will likely be sufficient to overcome said 102(b) rejections.

Applicant also discussed allowing submission of this Request without any extension fee. Applicant has previously asserted several reasons justifying such treatment, such as: (a) Rejection grounds based upon one patent cited as prior art, when in fact the cited language or concept does not exist in that patent; Applicant is entitled to a determination of precisely which patent was being relied upon to reject Applicant's application, and to discuss the propriety of such a rejection; (b) Distinguishing features and limitations of the claimed invention that have never been considered, discussed or expressly dismissed by the Examiner; (c) A rejection based upon the Examiner's erroneous belief that Applicant admitted that one cited patent taught all of the limitations of the claimed invention; (d) A rejection based upon unspecified functional recitations which, according to the Examiner, are inherent in one of the cited patents; (e) A rejection based upon the Examiner's misunderstanding that the human palate is an element or limitation of the claimed invention; (f) a verbal request for telephone interview made several days before expiration of the 3-month fee-free

deadline on 1 October, which was denied due to quarter-ending obligations of the Examiner; and (g) following Applicant's follow-up written request for a telephone interview, the fact that it took over 30 days to obtain the case file from Central Filing, necessitating one continuance of the telephone interview initially scheduled.

Applicant respectfully submits that he has not been allowed to take full advantage of the initial fee-free period, although Applicant has acted diligently to do so. Applicant therefore reiterates his request to submit this Request without payment of any extension fee.

A. Regarding Rejections under 35 U.S.C. ' 112, second paragraph.

Claims 1 - 20 are rejected under 35 U.S.C. ' 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter regarded as the invention. According to the Final Action, the claims are replete with indefiniteness, and the following noted examples are responded to:

1. Lack of antecedent basis for "the frame" in claim 1. Applicant respectfully submits that the quoted phrase needs no antecedent basis, because it does not pertain to a claim element. Terms found in the preamble to the claim text (e.g., generally before "comprising") do not constitute claim elements, and do not generally limit the claims. *DeGeorge v. Bernier*, 768 F.2d 1318, 1322 n.3, 226 USPQ 758, 764 n.3 (Fed. Cir. 1985); *Allen Engineering Corp. v. Bartell Industries Inc.*, 299 F.3d 1336 (Fed. Cir. 2002). Accordingly, such terms need no antecedent basis. However, without waiving such contentions, Applicant at this time amends said claim to satisfy said rejection ground.
2. Lack of antecedent basis for "the reeds" in claim 1. For the reasons set forth in item 1 hereinabove, Applicant respectfully submits that the quoted phrase needs no antecedent basis, because it does not pertain to a claim element. However, without waiving such contentions, Applicant at this time amends said claim to satisfy said rejection ground.

3. Lack of antecedent basis for "said cavity dorsally" in claim 2. Applicant respectfully submits that the Examiner misreads claim 2. The phrase "said cavity" finds antecedent basis in claims 1 from which it depends, namely, "an essentially planar cavity". (Claim 1, line 3.) The phrase "dorsally bounded by buttress of said housing" of claim 2 further limits "said cavity". Based upon the understanding of the terms "dorsal" and "buttress" during the telephone interview, the Examiner stated that this rejection ground had been overcome.

4. Lack of antecedent basis for "said mated pair" in line 3 of claim 3. Lines 1 and 2 of claim 3 include a "pair of essentially horseshoe-shaped planar halves folded joined at their ends, each half mate-able with" a corresponding plane of the other half. (Underlining added.) The "mated-pair" of line 3 of claim 3 finds antecedent basis in that quoted and underlined language. However, without waiving such contentions, Applicant at this time amends said claim to satisfy said rejection ground.

5. Lack of antecedent basis for "said contour-mimicking upper surface" in line 1 of claim 8. Claim 7 includes a flap comprising an "upper surface adapted to mimic the contour of the user's palate." (Underlining added.) This quoted and underlined language provides antecedent basis for "contour-mimicking upper surface" in claim 8. However, without waiving such contentions, Applicant at this time amends said claim to satisfy said rejection ground.

6. The Final Action expresses uncertainty as to what structure is encompassed by the phrase "adapted to" in line 3 of claim 1. Claim 1 includes an essentially planar elastomeric material defining an essentially planar cavity, adapted to relatively snugly capture the frame containing the reeds. The questioned phrase "adapted to" provides limits to the "planar cavity" structure recited in claim 1; the dimensions of the planar cavity are thereby limited to that which will relatively snugly capture the frame containing the reeds, without interfering with the sound producing characteristics of the reeds.

7. The Final Action expresses uncertainty as to what structure is encompassed by the phrase "sized for" in line 1 of claim 6. Claim 6 specifies a housing device described in claim 5, "sized for ready placement of the caller-housing combination at least near the palate of the user". The questioned phrase "sized for" limits the size of the housing device, to that necessary for placement of the caller-housing combination near the palate of the user. Such language is necessary, because the precise dimensions of the palate of the user are unknown, and are even variable. Applicant respectfully submits that it is appropriate to define the dimension of this claim limitation in such a manner, under such circumstances.

8. The Final Action expresses uncertainty as to what is encompassed by the phrase said cavity dorsally bounded by buttress" in line 3 of claim 2. Applicant claims buttress, especially as said term is used in the written description. The phrase "dorsally bounded by buttress of said housing" of claim 2 further limits "said cavity". At page 9 line 1 of the written description in the Application, "buttress" appears in the context of a supportive wall-like structure. The cavity may be "bounded by buttress of said housing." (Application, page 8 lines 17 & 18.) One version of the invention may also include a crescent or horseshoe-shape "flap integrally extending from the housing buttress or other outer edge of the cavity wall." (Application, page 10 lines 1 & 2.) Since buttress is included in said claims as a limitation, Applicant is claiming buttress as a claim element. Based upon the understanding of the terms "dorsal" and "buttress" during the telephone interview, the Examiner stated that this rejection ground had been overcome.

9. The Final Action expresses uncertainty as to what is encompassed by the phrase "ventrally oriented space essentially situated between the corresponding ventral arcs" in claim 3. It is noteworthy that said phrase is not part of the invention claimed in claim 3; said phrase is part of the preamble describing the unclaimed portion of the caller (i.e., the frame containing one or more

housed. Applicant assumes that this clarifies the scope of the affected claims; only the language appearing after "comprising" is intended to limit each respective claim.

B. Regarding Rejections under 35 U.S.C. '102(b).

Claims 1 - 20 are rejected under 35 U.S.C. '102(b) as anticipated by U.S. Patent No. 4,960,400 issued to Cooper (the "'400 Patent"), disclosing one or more flexible reed diaphragms secured within a frame, which is sealed within a yoke. Applicant respectfully submits that the present invention, which compares primarily to Cooper's yoke, is distinguishable from the '400 patent in several important respects.

Significantly, *Cooper's yoke does not allow any interchanging* of reeds/frames. Cooper's "assembled frame and diaphragms are placed on the adhesive surface 87 of ... the yoke 8, and the other half is folded over ... and the margins of the yoke pressed together to seal the space around the frame." ('400 Patent, column 3 line 67 through column 4 line 4.) Cooper discloses *no open cavity* for insertion of a variety of reeds/frames. By contrast, one primary object of the present "invention is to provide a housing that facilitates interchanging or substitution of caller frames readily. The hunter will thereby be enabled to change the tune or tenor of game calling relatively easily." (Application, page 3 lines 18 - 20.) This is part of the utility of the planar cavity of Applicant's invention. Although the user may alter the sound of the caller by conventional means such as by differential airflow or tongue action across the reed(s), additional utility is bestowed upon the present invention by the ability to quickly and easily substitute an entirely different reed/frame assembly.

Another distinguishing functional characteristic is that Cooper's yoke is *not resilient*; although the '400 Patent discloses a yoke "made of flexible tape" (column 2 line 13), the yoke has *no conformational memory* that is one hallmark of resiliency. The present invention has a "resiliency to provide the necessary housing characteristics, capturing characteristics and release features of the invention. Alternatively, the housing may be constructed with moldable materials having sufficient flexibility and conformational memory to essentially retain the molded conformation." (Application, page 8 lines 1 - 6.) Such conformational memory imparts utility upon the present invention, in several ways. It allows the present invention to essentially stretch open to envelop the reed/frame, then return to its resting conformation to retain that reed/frame until the user

desires to remove it or replace it with another reed/frame.

Conformational memory also better facilitates the blockage of air flow between the caller and the user's palate; the tendency of the housing to return to its resting conformation assures that the housing remains snug against the user's palate, rather than becoming warped and out of shape. The present invention is further distinguished from the '400 Patent in that Cooper's yoke does *not conform to the user's palate*. "Another object of the present invention is to provide a housing having a resiliently flexible flap capable of more comfortably preventing or reducing the misdirection of breath between the palate and caller (rather than beneath the caller)." (Application, page 3 lines 21 - 23.) "Another object of the invention is to provide a housing having a flap more readily conformable to the configuration of a user's palate. This will eliminate or reduce the natural gag reflex often accompanying the initial usage of similar callers presently in use." (Application, page 4 lines 1 - 3.)

Those are several sound, utilitarian grounds for distinguishing the present invention over the '400 Patent.

Claims 1 and 11 are rejected because, according to the Final Action, the '400 Patent teaches a device for housing comprising planar elastomeric material since Cooper teaches in column 6, paragraph 3, an inherent resilient corrugated material and a planar cavity configured as claimed. The '400 Patent has no paragraph 3 in column 6; column 6 of the '400 Patent includes claims 7 through 9, without any mention of corrugated material or a planar cavity. To the extent that this rejection was intended to cite a different patent issued to Cooper, U.S. Patent No. 5,061,220 (the "'220 Patent"), the corrugated material disclosed in paragraph 4 of column 6 of that patent does not provide any basis for rejecting Applicant's claims 1 and 11. Said isolated paragraph of the '220 Patent discloses an embodiment including a corrugated *reed*, "to give distinctive sound without materially affecting the ability of the diaphragm to vibrate." (Column 6, lines 59 and 60.) Whereas most of the reeds deployed by Cooper are flexible in all directions along its plane, corrugation reduces the flexibility in directions transverse to the corrugation. (In an everyday example, a sheet of corrugated

metal or plastic can be rolled with the corrugation "peaks" and "valleys" parallel to the axis of rolling, but not perpendicular to those "peaks" and "valleys") The "inherent resilience" disclosed in said paragraph allowed the normally flexible (i.e., unbiasing) reed to exert a "continuous biasing" to oppose the straightening of the corrugations caused by manually exerted (i.e., tongue) tension on the diaphragm. The '220 Patent does *not* disclose endowing its *yoke* with resilience or conformational memory. Just the opposite occurs when corrugating the normally-very-flexible reed; corrugation makes the reed less flexible than it previously was! Neither does the '220 Patent disclose any planar cavity bounded by elastomeric material. The '220 Patent actually teaches away from Applicant's invention using elastomeric material to solve the problem caused by the contours of the user's palate. Whereas the '220 Patent discloses wedge-shaped or stair-stepped legs on the reed-containing frame as being "particularly helpful to persons the roof of whose mouths slope downwardly forwardly" (Column 5 lines 33 through 35), Applicant goes the other way and solves those and other problems by constructing the entire housing for the reed-containing frame using elastomeric material.

Applicant respectfully submits that his claims 1 and 11 do not recite any elements for a frame to hold reeds together; the preamble to claim 1 distinguishes between the claimed "housing device" and the "frame containing the reed(s)". The Cooper frame functions only to hold the reeds in planar lineal alignment. The plastic frame of Cooper, cited by the Final Action, is not analogous to the elastomeric housing claimed in this Application. The plastic frame in the '400 Patent is intended to *rigidly* support most of the outer margins of the reed; that is why it is made of aluminum or plastic. ('400 Patent, column 2 line 11.) The Cooper frame has *no conformational memory*, nor any of the other distinguishing characteristics explained immediately above. Nor does Cooper disclose any free-standing planar cavity bounded by elastomeric material; the "assembled frame and diaphragms are placed on the adhesive surface 87 of one of the lobes 81 or 82 of the yoke 8, and the other half is folded over as illustrated in FIG. 6, and the margins of the yoke are pressed together to seal the space around the frame". ('400 Patent, column 3 line 67 through column 4 line 3, underlining added.) Cooper's Figure 6 is an exploded view. Cooper's yoke has no cavity; it is essentially a strip of tape

having adhesive on one side, which is folded over Cooper's reed-containing frame and sealed tightly.

Claims 2 and 12 are rejected because, according to the Final Action, Cooper's upper and lower frame teaches Applicant's ventral aspect and a dorsal aspect. Applicant again contends that these claims do not recite any elements of a reed-containing frame. Cooper's yoke is the portion most arguably related to Applicant's invention; although Cooper's yoke includes an upper lobe and a lower lobe arguably similar to Applicant's dorsal aspect and ventral aspect, Cooper's yoke is not made of elastomeric material. More importantly, these two aspects are not necessarily the primary distinguishing features of these claims. Anticipation under 35 U.S.C. ' 102(b) essentially requires a single prior art reference to disclose all elements recited in a claim in a pending application; there is no anticipation if that reference does not disclose all elements claimed by Applicant. Just because Cooper arguably discloses Applicant's dorsal and ventral aspects does not mean Cooper anticipates Applicant's claims 2 and 12. Beside the several distinguishing characteristics of claims 1 and 11 (explained immediately above), from which each of these claims depends, claims 2 and 12 are further distinguished by the buttress (wall) forming the boundary of the cavity. In the '400 Patent, no such boundary exists, and the reed-frame is merely held stationary by being sandwiched between two pieces of tape stuck together. Contrary to the examiner's assertion, Applicant certainly does not admit "that Cooper teaches the limitations of the claimed invention." (Final Action, page 6, second full paragraph.)

Claims 3 and 13 are rejected because, according to the Final Action, Cooper further teaches at least one resiliently-flexible reed since Cooper teaches a flexible frame (column 1, paragraph 8) and the diaphragms or reeds are inherently resilient (column 6, paragraph 4). Column 1, paragraph 8 of the '400 Patent does not disclose a flexible frame, nor does any other portion of the '400 Patent. The disclosure of "flexible" in said paragraph pertains to "tonal responses" and "frequency manipulation", not the physical characteristics of the frame. (Column 1, lines 59 and 64, respectively.) The frame is made of aluminum or plastic (Column 2, line 11), not typically considered flexible. Moreover, the difference between flexibility and resilience has been emphasized elsewhere

herein. To the extent flexibility (as distinguished from resilience) is relevant, Cooper used the term "flexible", but only in connection with the yoke tape. (Column 2, line 13.)

Applicant submits that neither the reed(s) nor the frame are claimed limitations of claim 3; those items are found within the preamble to the claimed elements in claim 1 from which claim 3 depends. With respect to claim 13 of the present invention, those items form part of the "combination", distinguished from the '400 Patent by the several distinguishing characteristics recited for the housing device (explained immediately above, such as, for example, elastomeric material defining and essentially planar cavity adapted to relatively snugly capture of the frame). Any inherent resilience of the reeds is irrelevant to the patentability of claims 3 and 13; nor does paragraph 4 of column 6 of the '400 Patent disclose any inherent resilience, as explained hereinabove.

Claims 4 and 14 are rejected because, according to the Final Action, in the '400 Patent the prong (82) of channels (80) defines a neck (83) of Cooper, to meet the definition of Applicant's endstop. The '400 Patent does not disclose any prong (82) of channels (80) defining a neck (83). To the extent that the Final Action intended to cite the '220 Patent, the disclosure of the prong, channels and neck (in column 6, lines 9 through 37 of the '220 Patent) are irrelevant to the patentability of Applicant's claims 4 and 14. Said disclosure pertains to the mounting of the reed(s) with variable tautness, "zip locked" between legs of the reed-containing frame. The examiner appears to mistakenly believe that the endstop is an element of the reed-containing frame appearing in the preamble to claims 4 and 14. Applicant's endstops function to retain the frame after it is inserted within the cavity of the housing, but allow removal of the frame when desired. Claims 4 and 14 are not anticipated unless each claim element is contained in a single prior art reference. The '400 Patent is no such reference.

Claims 5 and 15 are rejected because, according to the Final Action, in the '400 Patent the frame 20 has legs 22 and 23 joined by a cross-piece 24 (in Figure 5 of the '400 Patent), to meet the definition of Applicant's claimed crescent flap. The '400 Patent does not disclose any frame 20

having legs 22 and 23 joined by a cross-piece 24, in Figure 5 or any other portion of the written description. To the extent that the Final Action intended to cite the '220 Patent, Applicant submits that the cited disclosure concerning the reed-containing frame is irrelevant to the patentability of Applicant's housing. Moreover, said legs and cross-piece do not meet the definition of Applicant's claimed crescent flap. As stated on page five of the Application, the word "crescent" means

having at least one essentially convex edge, perhaps terminating in end points (or similar transition configurations) also comprising the termination points of an essentially concave edge; crescent may refer to the general shape of the flap portion of the housing, or that of the housing (including the integral or contiguous flap portion).

Clearly the disclosure of the '220 Patent does not endow the legs and cross-piece with these characteristics.

Applicant submits that there are other distinguishing characteristics found in the claims from which claims 5 and 15 depend. Although the '400 Patent teaches a flap superficially resembling the flap in the present invention, the Cooper flap is neither elastomeric nor moldable to the user's palate. The several distinguishing characteristics explained hereinabove apply equally to overcome this rejection.

Claims 6 and 16 are rejected because, according to the Final Action, the unspecified functional recitations are inherent in the device of Cooper. Applicant submits that the folded flexible tape of the '400 Patent is not elastomeric; it has no conformational memory. The Cooper device does not conform to contours of the user's palate, and therefore is not adapted to relatively snugly contact the user's palate as claimed in said claims. The distinguishing characteristics as to other claim elements explained hereinabove apply equally to this rejection.

Claims 7, 8, 17 and 18 are rejected because, according to the Final Action, the '400 Patent discloses an upper surface (31) in Figure 5 which meets the definition of Applicant's claimed upper surface. Figure 5 of the '400 Patent depicts Cooper's invention from a side elevation view, indicating that the upper surface essentially mirrors the lower surface; nowhere does the '400 Patent

disclose an essentially convex upper surface adapted to mimic the contour of the user's palate. In fact, the '220 Patent issued to Cooper recognizes that problems might exist arising from the configuration of the roof of the user's mouth, but the '220 teaches away by disclosing solutions directed toward the characteristics of the frame legs rather than the yoke. By contrast, comparison of Cooper's Figure 5 with Applicant's Figure 3 illustrates the distinguishing characteristics of claims 7 and 17 (upper surface adapted to mimic the contour of the user's palate), and Claims 8 and 18 (an essentially convex surface). These distinguishing features are not taught by the '400 Patent.

Claims 9 and 19 are rejected because, according to the Final Action, the '400 Patent teaches a human palate in Figure 6 since when the call is used, the forward edge 29 is closer to the lips of the user and the upper surface 31 is adjacent to the roof of the mouth of the user. Applicant respectfully submits that neither the '400 Patent nor the present application claims a human palate. To the extent that a human palate is included in any of the claims of the present invention, it is included primarily to define the contour mimicked or assumed by the upper surface of the reed-frame housing. Applicant requests the examiner to provide the column and line citation wherein the '400 Patent discloses that the Cooper invention includes the ability to assume the contour of the user's palate.

Claims 10 and 20 are rejected because, according to the Final Action, the '400 Patent discloses a surface of Figure 6 that meets the definition of Applicant's claimed concave lower surface. Applicant believes that the Final Action mistakes the outer-arcing edge of the flap in Cooper's Figure 6 as concave rather than convex. In either event, Figure 4 of Applicant's invention depicts a concave lower surface (41) when viewing the present invention in a side elevation view from the back. Such concavity is similar to that experienced when one runs his or her tongue tip along the roof of the mouth. Nothing in Cooper teaches a concave lower surface. Applicant requests the examiner to provide the column and line citation wherein the '400 Patent discloses that the Cooper invention include a concave lower surface.

C. Reply to Response to Arguments.


The Final Action states the examiner's belief that Applicant asserts an argument that Cooper

is non-analogous to the claimed invention. Rather than arguing that Cooper is non-analogous art, Applicant contends that his invention is neither anticipated by Cooper nor obvious in view of Cooper. All the distinguishing characteristics have been set forth above. Moreover, Applicant does not admit that Cooper teaches the limitations of the claimed inventions, as asserted in the Final Action.

II. CONCLUSION

Applicant thanks the Examiner for her assistance in this matter; in the event no claims are found allowable, Applicant requests a telephone interview with the Primary Examiner at 1:00 p.m. eastern time on 15 November 2002, or as soon thereafter as feasible. Based upon the foregoing, Applicant believes that all objections and rejections raised in the Final Action have been satisfied, putting all pending claims 1 through 20 in condition for allowance.

Respectfully submitted,


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